

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR

Annual Report 12/2/76
No production

In the Matter of:

The World's Best Products,
Inc.

Respondent

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I.F. & R. Docket No. V-331C

PARTIAL ACCELERATED DECISION

On March 30, 1976, Complainant, U.S. Environmental Protection Agency issued a Complaint and Notice of Opportunity for Hearing, charging Respondent with a violation of Sections 7 and 12(a)(2)(L) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136e and 7 U.S.C. 136j(a)(2)(L) for failure to submit pesticides reports under the Act. The World's Best Products, Inc., is the registered producer of the product "CHEM-GARD Liquid Grain Preservative," which was accepted for registration on August 27, 1973 and was issued EPA Reg. No. 13890-1 on February 7, 1974, and contains one ingredient, one hundred percent Propionic Acid. Respondent has not manufactured any of this product during the entire period August 27, 1973 through March 30, 1976, for which it is alleged by Complainant that annual reports are required pursuant to Section 7(c)(2), FIFRA, 7 U.S.C. 136e(c)(1).

Respondent alleges that it has not "produced" or "operated" an establishment within the meaning of FIFRA, therefore, it is not required to file the annual reports under 7 U.S.C. 136e for the years of non-production. In support of this contention, Respondent cites Section 7 of the Act and the language contained in several instructional documents relating to the filing of annual reports. Complainant considers this interpretation of Section 7(c)(1) erroneous and detrimental to the regulatory scheme set forth in FIFRA. The Agency further believes that should Respondent's interpretation of Section 7(c)(1) be upheld, it will seriously interfere with the Agency's administration of that regulatory program.

Complainant's statement of the issue here presented is well put, and is as follows:

"Whether a facility, registered to manufacture pesticides pursuant to 7 U.S.C. 136e, and required to report actual annual production to the U.S. Environmental Protection Agency, must also report no production in those years in which no pesticides were produced."

Section 7 of the FIFRA, as amended, at (c)(1) states:

"Any producer operating an establishment registered under this section shall inform the Administrator within 30 days after it is registered of the types and amounts of pesticides--

- (A) which he is currently producing
- (B) which he has produced during the past year
- (C) which he has sold or distributed during the past year.

"The information required by this paragraph shall be kept current and submitted to the Administrator as required under such regulations as the Administrator may prescribe." 7 U.S.C. 136e(c)(1).
(Emphasis supplied.)

Pesticides Regulations found at 40 CFR 167.5 state:

"(a) Information required. The pesticides report to be submitted on the EPA Pesticides Report form, shall include the name and address of the establishment; the types of pesticides produced, the past year's amount of production and sales or distribution of each product; and the amount of current production of each product . . ." (Emphasis supplied.)

"(c) When to report. Within 30 days of notification of registration of an establishment the producer of the establishment shall file with the Agency a pesticides report. Thereafter reports are required annually on or before February 1."

7 U.S.C. 136 defines the following terms:

"(w) The term 'producer' means the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device."

"(y) A 'Registrant' means a person who has registered any pesticide pursuant to the provisions of this Act."

"(dd) 'Establishment' means any place where a pesticide or device is produced, or held for distribution or sale."

The issue as to whether or not a report had to be filed is purely one of law. Applying the statute and regulations to the issue presented, I must find that annual reports are required by Respondent.

DISCUSSION

Respondent has voluntarily registered his establishment and pesticide product under 7 U.S.C. 136a and 7 U.S.C. 136e in order to secure the right to produce, sell, and distribute the product. Having done this, it is implicit that it then becomes subject to the reporting requirements set forth in 7 U.S.C. 136e and 40 CFR 167.5.

The statement in Section 7(c) of the Act that "The information required by this paragraph shall be kept current and submitted to the Administrator annually. . ." sets forth the reporting requirement to inform Complainant of the current status of pesticides production, sale, or distribution. If the current status is negative, this likewise must be reported, for FIFRA requires that the Agency superintend the field of pesticides production, distribution, and sales and inherent in this legislative mandate is the Agency's authority to determine who falls within these categories. I agree with the Initial Decision of Administrative Law Judge Jones in The Matter of Industrial Chemical Labs., Inc., I.F. & R. Docket No. VII-181C, which states:

"I find that Section 7 is 'regulatory' as opposed to a 'registration' provision. . . . Section 7(c)(1) evinces legislative intent that a registrant shall be required to furnish information, not merely to characterize the establishment registered, but to provide past, present, and future information concerning the production, sale, and distribution of pesticides throughout the nation. From a regulatory point of view, it is equally, if not more important to be informed on a regular basis as to the character and volume of pesticides produced, as to know the identity of the producer. The provision concerning the updating of said information is as much a part of the regulation contained in Section 7(c)(1) as is the furnishing of the initial information."

Reporting requirements are an integral part of a comprehensive Federal regulatory scheme to ensure the safe production, distribution, and use of materials covered by the Act. The information provided the Agency through the annual reporting requirement is integral to the regulatory scheme. To ensure efficient administration of FIFRA regulations, Complainant uses these reports to develop efficient monitoring and compliance in order to effect timely necessary enforcement. Complainant considers this information essential to an efficient allocation of the resources it has committed to the FIFRA regulatory program.

When World's Best registered its facility, it, in effect, represented to Complainant that it would produce pesticides. Based upon this affirmative representation, the Agency then had a duty to monitor World's Best's compliance with the Act. When Respondent decided not to produce, distribute, or sell, it became incumbent

upon the company to inform Complainant so that it could shift its resources to other areas in its program. Respondent could perform its duty to inform Complainant of its negative production activities in two ways: (1) by filing a negative annual report, or (2) by voluntarily relinquishing its registration. Respondent did neither and such failure to act is inconsistent and detrimental to the efficient administration of the Act.

One way that an establishment registrant may lose his registration and license to produce, distribute, and sell pesticides is to fail to make an annual report. 40 CFR 167.3. These regulations do not specify that this reporting requirement is contingent upon actual production, but merely that failure to file a report constitutes cause for withdrawal of the registration.

Respondent cannot maintain that Complainant failed to inform it of the requirement for submitting negative as well as positive reports. Complainant requested this information by letters received by Respondent on January 26, 1974, March 15, 1974, February 21, 1975, and October 30, 1975. Finally, on April 18, 1976, the Complainant sent Respondent a registered letter advising of its intent to terminate World's Best's establishment registration due to its non-reporting. Respondent contends in its answer that all reports for 1975 and 1976 were filed and that Complainant has "misfiled,

misplaced, or lost the originals of said reports." This factual issue is not addressed in this ruling, but will be resolved at a later date.

Respondent's basic argument in response to the Complaint is that by virtue of its non-production of pesticides, it is not a "producer" or "operating an establishment" within the meaning of 7 U.S.C. 136e. This section states that it is applicable to "any producer operating an establishment registered under this section. . . ." It is the act of registering that confers the status of "producer" on the registrant. The registered "producer" is not required to produce pesticides but merely to be "operating an establishment." Thus, if an individual receives a registration following his application under 7 U.S.C. 136e and maintains some establishment at which some manufacturing, production, or commercial activity is conducted, he immediately falls within the meaning of that section. It is the act of registration that confers the status of "operating an establishment" upon registrant when he conducts any commercial or manufacturing activities at a set identifiable place.

To accept Respondent's interpretation of 7 U.S.C. 136e, the Agency would forego a significant part of its regulatory program, contrary to its legislative mandate to superintend the entire field of actual and potential pesticides producers.

A quote from a Report of the House Committee on Agriculture prior to passage of the 1972 Amendments, H.R. Rep. No. 92-511, 92 Cong., 1st Sess. (1971), expresses the intent of the new Sec. 7 of the Act:

"The thrust of these amendments is to change FIFRA from a labeling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution, and use of pesticides."

Respondent, in paragraphs 1, 2, and 3 of its brief, quotes the following language from 40 CFR 167.5 and also from letters relating to the 1974 and 1975 Pesticides Reports:

"Information is to be provided only for those products actually produced at the reporting establishment; please note that information concerning products sold or distributed by but not produced at the reporting establishment is not to be included in this report."

The meaning placed upon this sentence by Respondent is erroneous. Respondent contends that the underscored portion of the sentence means simply that if nothing was produced, there is no requirement to report. This entire statement must be read together, that is, the second portion of the sentence is merely explanatory of that portion appearing before the semicolon. The underscored portion does not negate the requirement to report provided for in Sec. 7(c) of the Act.

This reasoning is further enhanced by the language of paragraph 3 of Complainant's Exhibits 3 and 4 which in effect indicates the need to know whether there was any production of the registered pesticide:

"The information derived from these reports will be used by the Agency to develop inspectional and sampling strategies for more efficient monitoring of compliance with the Act and to effect timely and necessary enforcement actions. At the same time these data will provide positive benefits to the producer. By knowing when, where, and in what amounts pesticide products exist, the Agency can refine its enforcement efforts such that minimal disruption is experienced by the producer."

I have more difficulty disposing of Respondent's argument that the language contained in EPA Form 3540-16 does, in fact, absolve it of the requirement to file. It is as follows:

"Do not report products which were not produced in the past year and will not be produced in the current year."

However, even though it seems unambiguous at the first reading, I must conclude that, as applied to this matter it does mean that if no products were produced, that is the "amount" to be reported.

This interpretation follows the thought throughout this decision that it is important for Complainant to know if "any amount" was produced.

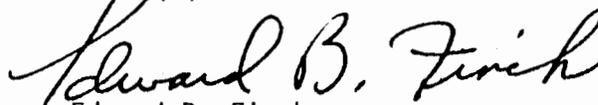
Taken in the context of the whole paragraph, I do not believe this sentence was meant to apply to a product which was **never produced**, but, rather to a line of products which had been produced at one time and may again be currently produced.

It seems abundantly clear that some statement should be made in the instructions, letters, etc., which would clarify the requirements of the law for a party situated as is Respondent.

Under these present circumstances I would be reluctant to assess a civil penalty. Any assessment would be based upon the record after a hearing on the factual issues:

- (1) Did Respondent file the reports as alleged?
- (2) Did Respondent reply to the letters from Complainant, and, if not, why not?
- (3) Respondent's ability to pay a civil penalty and remain in business.

I do find, however, that Respondent was required to notify the Administrator of the types and amounts of production, including no production, thirty (30) days after registration and to file annual reports as provided for in Sec. 1(c) of the Act.


Edward B. Finch
Administrative Law Judge

December 13, 1976